Supreme Court, U.S.
FILED
APR 5 - 2010
OFFICE OF THE CLERK

No. 09-1052

In the Supreme Court of the United States

KEVIN KEITH,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Ohio, Third District

BRIEF FOR THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

David Loftis
Nina Morrison
Counsel of Record
INNOCENCE PROJECT
100 5th Ave., 3rd Fl.
New York, NY 10011
(212) 364-5966
nmorrison@innocenceproject.org

Daniel S. Medwed
Professor of Law
S.J. Quinney College of Law
University of Utah
332 S 1400 E Front
Salt Lake City, UT 84112
(801) 585-5228

Vernon Broderick
Adam B. Banks
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Aaron Y. Huang
WEIL, GOTSHAL & MANGES LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
(650) 802-3000

Counsel for Amicus Curiae

QUESTION PRESENTED

When a death-sentenced defendant raises claims under *Brady v. Maryland*, 373 U.S. 83 (1963), that the prosecution suppressed evidence favorable to him, does a state court act contrary to this Court's precedents when it rejects those claims by relying on the sufficiency of the evidence presented at trial?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

REASONS FOR GRANTING THE WRIT 3

I. The Ohio Court of Appeals Incorrectly Applied A "Sufficiency Of The Evidence" Standard, Expressly Rejected By This Court, To Evaluate Petitioner's *Brady* Claim 3

II. Suppressed Evidence Will Never Be Material Under A Sufficiency of the Evidence Test, But Here, When The Suppressed Evidence Is Viewed As A Whole Consistent With This Court's Precedents, It Undermines Confidence In The Outcome Of Keith's Trial 7

A. A Sufficiency Test Inherently Fails To Take Into Consideration *Brady* Evidence Of Third-Party Guilt 7

B. Consideration Of The Suppressed Evidence As A Whole Undermines Confidence In The Outcome of Keith's Trial 11

TABLE OF CONTENTS

Page

III. The Proper Application Of *Brady* Has Critical Implications For Exonerating The Wrongfully Accused 17

A. A Sufficiency of the Evidence Test Has Similarly Failed To Detect *Brady* Violations In Other Capital Cases Where Prisoners Were Later Exonerated 17

B. The Proper Application Of *Brady* Is Critical To Securing New Trials For The Wrongfully Convicted 20

IV. This Court Should Grant Certiorari To Prevent Substantial Injustice. 22

CONCLUSION 26

APPENDIX

List of Innocence Network Member Organizations 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Banks v. Dretke,
540 U.S. 668 (2004) 3, 14

Brady v. Maryland,
373 U.S. 83 (1963) 2, 3, 24

Cone v. Bell,
129 S. Ct. 1769 (2009) 22

Giglio v. United States,
405 U.S. 150, 154 (1972) 4, 14

Holmes v. South Carolina,
547 U.S. 319 (2006) 9

House v. Bell,
547 U.S. 518 (2006) 8

Jackson v. Virginia,
443 U.S. 307 (1979) 8

Keith v. Bobby,
551 F.3d 555 (6th Cir. 2009) 11, 12, 16

Kyles v. Whitley,
514 U.S. 419 (1995) ..... passim

Mooney v. Holohan,
294 U.S. 103 (1935) 23

TABLE OF AUTHORITIES
(continued)

Page(s)

Napue v. Illinois,
360 U.S. 264 (1959) 4, 13, 14

People v. Porter,
647 N.E.2d 972 (Ill. 1995) 18, 19

Pyle v. Kansas,
317 U.S. 213 (1942) 21

Strickland v. Washington,
466 U.S. 668 (1984) 19

Strickler v. Greene,
527 U.S. 263 (1999) 10

Towers v. Smith,
395 F.3d 251 (6th Cir. 2005) 16

United States v. Agurs,
427 U.S. 97 (1976) 5, 23

United States v. Bagley,
473 U.S. 667 (1985) 3, 4, 21, 23

Washington v. State of Texas,
822 S.W.2d 110 (Tex. Ct. App. 1991) 17, 18

Youngblood v. West Virginia,
547 U.S. 867 (2006) (per curiam) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 Ind. L. J. 481 (2009) 21

Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Calif. L. Rev. 1471 (1993)..... 21

Northwestern Law Bluhm Legal Clinic, Center On Wrongful Convictions: Anthony Porter, http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilPorterSummary.html (last visited Apr. 2, 2010) 20

Paul R. Wallace, *Prosecuting in the Limelight*, 22 Del. Law. 20 (2005)..... 21

Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 Wis. L. Rev. 399, 405 (2006).... 20, 21

Robert H. Jackson, *The Federal Prosecutor, Address Before Second Annual Conference of U.S. Attorneys (Apr. 1, 1940)*, 31 J. Am. Inst. Crim. L. & Criminology 3 (1940) 20

TABLE OF AUTHORITIES
(continued)

Page(s)

The Innocence Project - Profiles: Calvin Washington, http://www.innocenceproject.org/ Content/283.php (last visited Apr. 2, 2010) 18

INTEREST OF *AMICUS CURIAE*[1]

The Innocence Network is an association of organizations dedicated to providing pro bono legal and investigative services to prisoners for whom evidence discovered after conviction can provide conclusive proof of innocence. The fifty-two current members of the Network represent hundreds of prisoners with innocence claims in all fifty states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand.[2] The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Innocence Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

---

[1] The parties have consented to the filing of this brief. Their consent letters have been filed with the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] The member entities are listed in the Appendix.

SUMMARY OF ARGUMENT

For nearly fifty years, this Court has recognized that a defendant's right to due process is infringed when a prosecutor withholds material evidence favorable to him. *See Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner Kevin Keith sought a new trial based on his discovery that the prosecution suppressed evidence implicating someone else in the murders for which he was sentenced to death. Keith also discovered that testimony bolstering key eyewitness testimony was false. Despite the weight of this evidence, and in direct conflict with this Court's precedents, the Ohio Court of Appeals denied Keith's *Brady* claim, holding that the newly uncovered evidence was not material because the evidence that was presented at trial was sufficient to support his conviction.

In applying a sufficiency of the evidence test to evaluate Keith's *Brady* claim, the Ohio Court of Appeals gave no consideration whatsoever to the nature and weight of the suppressed evidence. This approach directly conflicts with the long-standing analysis that this Court has emphasized is the correct approach to deciding *Brady* cases. Indeed, a sufficiency test, like that applied by the Ohio Court of Appeals, will never remedy a *Brady* violation, even in the most egregious cases of police and prosecutorial misconduct.

The Ohio Court of Appeals' wayward decision has implications beyond Keith's own case. Prosecutorial misconduct, whether intentional or not, is a major cause of wrongful convictions. And

courts, in faithfully applying the *Brady* doctrine, are often the last resort to remedy *Brady* violations. For that reason, courts must take seriously their obligations to evaluate *Brady* claims, and must apply the doctrine with vigilance and care. The Ohio Court of Appeals did not do so here. If left uncorrected, the Ohio Court of Appeals' decision risks working a substantial injustice, not only for Keith, but also for other wrongfully convicted prisoners who come before the Ohio courts.

REASONS FOR GRANTING THE WRIT

I. The Ohio Court of Appeals Incorrectly Applied A "Sufficiency Of The Evidence" Standard, Expressly Rejected By This Court, To Evaluate Petitioner's *Brady* Claim

This Court should grant Petitioner Keith's Petition for a Writ of Certiorari to preserve the integrity and faithful application of due process rights protected under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Under this well-established doctrine, the prosecution's suppression of material evidence favorable to an accused violates due process. *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 669 (2004).[3] In *United States v. Bagley*, 473 U.S. 667, 682 (1985), this Court held that evidence is material under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to

---

[3] Suppression may occur even inadvertently, *Banks*, 540 U.S. at 691, and even without the prosecution's actual knowledge of the existence of the suppressed evidence. *Kyles v. Whitley*, 514 U.S. 419, 438–39 (1995).

the defense, the result of the proceeding would have been different." A "reasonable probability," this Court explained, is a probability "sufficient to undermine confidence in the outcome" of the trial. *Id.* The reasonable probability standard is not a more-likely-than-not standard; a defendant need not show by a preponderance of the evidence that he or she would have been acquitted had the evidence at issue been presented. *See Kyles*, 514 U.S. at 434 (citing *Bagley*, 473 U.S. at 682). And, when the suppressed evidence is false testimony, "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)).

This Court has emphasized that the materiality analysis under *Brady* is not a sufficiency of the evidence test. *Kyles*, 514 U.S. at 434. "A defendant need not demonstrate that after discounting the inculpatory evidence, there would have been enough left to convict." *Id.* at 434-35; *see also id.* at 435 n.8 ("This rule is clear, and none of the *Brady* cases has ever suggested that sufficiency of the evidence (or insufficiency) is the touchstone."). Rather, the test is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light so as to undermine confidence in the verdict." *Id.* at 435.

In this case, the Ohio Court of Appeals correctly stated the *Brady* materiality test, but it failed to apply that standard correctly. Instead, it stated only that the suppressed evidence was not

material because "[m]uch of the evidence was already presented at trial, if not directly at least inferentially. Furthermore, a jury of twelve citizens found the evidence presented sufficient to convict Keith, and this verdict has stood the test of time and an exhaustive series of both state and federal appeals." Pet. App. 16a.

The Ohio Court of Appeals' cursory treatment of Keith's *Brady* claim demonstrates three critical errors that, if left to stand, may well result in the execution of an innocent man and the continued misapplication of *Brady* in Ohio. *First*, by stating that "much" of the evidence was presented at trial, it acknowledged that some of the evidence at issue was *not* presented at trial. Pet. App. 16a. Yet the court failed to identify that evidence or to evaluate whether its presentation would have affected the outcome of the case. This stands in contradiction to this Court's jurisprudence requiring *all* evidence be considered in evaluating a *Brady* claim. *See United States v. Agurs*, 427 U.S. 97, 112 (1976) (stating that the materiality of non-disclosed evidence "must be evaluated in the context of the entire record").

Second, when the Ohio Court of Appeals referred to evidence "inferentially" presented at trial, it confused evidence with inferences drawn from it. Pet. App. 16a. The court was likely referring here to defense counsel's suggestion at trial that Melton, not Keith, was responsible for the murders.[4] But evidence cannot be "inferentially" presented; it is

---

[4] Some evidence admitted at trial supported defense counsel's argument that Melton was the murderer. *Infra* at 16–17.

either presented to a jury or it is not. The jury can make inferences only on the evidence actually presented. If it were otherwise, juries would be free to base a verdict on speculation, conjecture, and inferences based on evidence that was never admitted. Surely, a court cannot assume that a jury would shirk its duties in this way. But it is only by making such a cynical assumption that the Ohio Court of Appeals can ignore the fact that the evidence at issue here was never brought before the jury at all.

Third, the Ohio Court of Appeals supported its conclusion by asserting that "a jury of twelve citizens found the evidence presented sufficient to convict Keith." Pet. App. 16a. In doing so, it plainly relied on a sufficiency test, despite this Court's admonition in *Kyles* that the materiality inquiry "is not a sufficiency of evidence test." 514 U.S. at 434 But the sufficiency test employed by the Ohio Court of Appeals is even farther from the mark than the one rejected by this Court in *Kyles*. *Kyles* rejected a test that addressed whether there would have been sufficient inculpatory evidence if, hypothetically, the suppressed exculpatory evidence at issue had been introduced. *Id.* The Ohio Court of Appeals, deviating even more from this Court's precedents, considered the sufficiency only of the inculpatory evidence actually presented—even after acknowledging that some of the evidence at issue had not been presented at all. It is difficult to conceive how a court could more blithely disregard this Court's *Brady* jurisprudence. If uncorrected, the Ohio Court of Appeals, and possibly other Ohio courts, will continue to misapply *Brady*, potentially

resulting in upholding other wrongful convictions in Ohio.

II. Suppressed Evidence Will Never Be Material Under A Sufficiency of the Evidence Test, But Here, When The Suppressed Evidence Is Viewed As A Whole Consistent With This Court's Precedents, It Undermines Confidence In The Outcome Of Keith's Trial

A sufficiency of the evidence test, like that applied by the Ohio Court of Appeals here, will by definition fail to vindicate the important due process rights protected by *Brady*. The shortcomings of a sufficiency of the evidence analysis are particularly evident where, as here, the suppressed evidence includes compelling evidence of third-party guilt and evidence that the prosecution introduced false testimony to bolster inherently unreliable eyewitness identification.

A. A Sufficiency Test Inherently Fails To Take Into Consideration *Brady* Evidence Of Third-Party Guilt

By its very nature, a sufficiency of the evidence test, like the one applied by the Ohio Court of Appeals here, can never identify the due process violation that occurs when the police suppress evidence of third-party guilt. A sufficiency of the evidence test answers only the question whether the evidence presented at trial could have supported the jury's verdict. This question is irrelevant where, as here, the alleged constitutional harm concerns evidence that was never presented to the jury

because the state violated its constitutional duty to disclose it.

The failings of a sufficiency of the evidence test are even more egregious when the suppressed evidence is evidence of third-party guilt. Evidence that another person is responsible for a crime does not necessarily attack the sufficiency of the prosecution's case against an accused. Rather, third-party guilt evidence works to construct the defense's theory of the case by establishing innocence through authenticating the identity of the actual perpetrator. Considering only whether new evidence weakens evidence the prosecution put forward fails to give enough weight to the force of third-party guilt evidence. And the Ohio Court of Appeals did not even go this far: it held that the evidence actually presented at trial was sufficient to support Keith's conviction, without any regard whatsoever to the strength of the newly-disclosed third-party guilt evidence. [5]

Applying a sufficiency standard to examine *Brady* claims involving evidence of third-party guilt also fails to vindicate the due process rights this

---

[5] This Court made this point in *House v. Bell*, 547 U.S. 518 (2006), where it considered an actual innocence claim based on new DNA evidence of third-party guilt. The Court explained that a sufficiency of the evidence test, like that employed in *Jackson v. Virginia*, 443 U.S. 307 (1979), is inappropriate where convictions are challenged on the basis of evidence that was not before the jury. *House*, 547 U.S. at 538. Instead such claims require courts "to assess how reasonable jurors would react to the overall, newly supplemented record." *Id.*

Court recognized in *Holmes v. South Carolina*, 547 U.S. 319 (2006). In *Holmes*, this Court overturned a state evidentiary rule that prohibited defendants from introducing evidence of third-party guilt where there is strong forensic evidence implicating the defendant. *Id.* at 331. The Court explained that a defendant has a right to present a complete defense, *id.* at 324, and that such a rule arbitrarily interfered with that right. *Id.* at 331.

In *Holmes*, this Court stressed that the probative value of evidence of third-party guilt cannot be evaluated solely by looking at the case put forth by the prosecution. *See id.* at 329-31. Similarly, in the *Brady* context, a court cannot vindicate a defendant's right to a complete defense by looking only to the strength of evidence actually introduced. But this is exactly what was done here by the Ohio Court of Appeals.

Moreover, the sufficiency analysis of the Ohio Court of Appeals undermines the central purpose of *Brady*: to ensure the fairness and integrity of the criminal process. In criminal trials, only the defense will present evidence of third-party guilt. And it is often the case that the defense must rely on the prosecution and the vast resources of the State to provide such evidence. Evidence uncovered during a police investigation that tends to implicate someone other than the defendant will most likely be found only in law enforcement's own files, and the authorities often have exclusive access to a crime scene and the evidence collected there. Similarly, law enforcement authorities often have exclusive or at least initial access to witnesses. By withholding

evidence discovered during investigations, the police can prevent the defense from establishing viable leads to other suspects. The *Brady* rule exists in part to remedy this imbalance of access. *See Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (per curiam) ("*Brady* suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor." (internal citations omitted)).

Furthermore, when evidence of third-party guilt is uncovered, and when such evidence might render the prosecution's case less compelling, prosecutors have a strong incentive to suppress such evidence, despite their duty to seek the truth and not simply convictions. Indeed, that is the central motivation behind the *Brady* rule. *See Strickler v. Greene*, 527 U.S. 263, 281 (1999) (noting that the *Brady* obligation stems from the American prosecutor's role as a representative of the impartial sovereign, not of an ordinary litigant). But, if courts reviewed *Brady* claims under the standard applied by the Ohio Court of Appeals here, they would fail to remedy serious due process violations, even in the most egregious cases of police and prosecutorial misconduct.

Thus, applying the proper *Brady* analysis is imperative, particularly in a case such as this one, where the suppressed evidence of third-party guilt is compelling. For that reason, this Court has insisted that the proper *Brady* materiality analysis depends on "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the

verdict." *Kyles*, 514 U.S. at 435. And for that reason, the Ohio Court of Appeals' analysis, if left to stand, will work a substantial injustice in this case and potentially future cases.

B. Consideration Of The Suppressed Evidence As A Whole Undermines Confidence In The Outcome of Keith's Trial

The suppressed evidence in this case includes three critical pieces of new evidence implicating Rodney Melton, not Petitioner Keith, in the murders. *First*, evidence from a file in a separate investigation shows that two weeks before the shooting, Melton stated that "he had been paid $15,000 to cripple the man who was responsible for the raids in Crestline, Ohio last week," referring to Rudel Chatman, the brother of victim Marichell Chatman. *Keith v. Bobby*, 551 F.3d 555, 560 561 (6th Cir. 2009) (Clay, J., dissenting). According to a witness report, before shooting his victims, the murderer complained about Rudel Chatman "ratting on people." *See* Pet. App. 10a. *Second*, police interview records show that Melton's accomplice in a pharmacy burglary ring told police that Melton had been paid to kill Chatman and threatened to kill anyone else who snitched on him, *Keith*, 551 F.3d at 561 (Clay, J., dissenting), a statement that is consistent with Melton's own statement. *Third*, additional undisclosed evidence in police files describes Melton's modus operandi of wearing a mask similar to that described by witnesses to the murders when he engaged in criminal activity. *Id.*

The new evidence also demonstrates that the police actively concealed from Keith evidence that Melton was the shooter. Two of the investigators who worked on Keith's case also participated in the interview with one of Melton's accomplices in the pharmacy robberies in which the accomplice described Melton's threats to kill those who snitched on him and Melton's boasts of having been paid to kill Chatman. *Id.*

Also suppressed in this case is evidence that the prosecution introduced false testimony to bolster the shaky eyewitness identification by Richard Warren, a surviving victim of the shooting, who identified Keith as the shooter after previously stating on several occasions that he could not see the masked shooter's face. *See id.* at 562 n.2. The jury heard from Captain John Stanley, who testified that he had received a call from "Amy Gimmets," purportedly the nurse attending to Warren. According to Stanley, "Amy Gimmets" told him that Warren said the first name of his assailant was "Kevin." The prosecution used this testimony to fend off the defense's challenges that the police improperly influenced Warren by supplying him with the name "Kevin." The prosecution also used this testimony to explain why the name array of potential suspects was limited to four individuals named "Kevin."

But new evidence shows that "Amy Gimmets" never existed. There are no records of an "Amy Gimmets" ever being employed by the hospital that treated Warren. In fact, no one by that name is licensed as a nurse in the State of Ohio. *See*

Defendant's New Trial Motion Exh. 5. And the discrepancy is not a simple typographical error; Amy Whisman (now Amy Petryk), the nurse who actually attended to Warren,[6] has filed an affidavit stating that Warren never identified "Kevin" as the shooter and that she never told Captain Stanley that he did. *See* Defendant's New Trial Motion Exh. 4. In other words, new evidence confirms that Captain Stanley's testimony that "Amy Gimmets" told him that Warren had identified "Kevin" as the shooter was false.

There is no excuse for the prosecution's endorsement of Captain Stanley's false testimony or its failure to disclose evidence that no "Amy Gimmets" actually existed. As this Court made clear in *Napue*, the Fourteenth Amendment forbids a prosecutor from knowingly soliciting false testimony or allowing it to go uncorrected. 360 U.S. at 269. The nonexistence of "Amy Gimmets" should have been known and disclosed by the prosecution, *see Kyles*, 514 U.S. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."), but it was uncovered by the defense only after the prosecution had secured Keith's conviction. This evidence alone would have affected the outcome of the trial.

---

[6] Captain Stanley's police report states that he spoke with nurse Amy Whisman. *See* Defendant's New Trial Motion Exh. 10.

The Ohio Court of Appeals, however, never considered whether there is a reasonable probability that the suppressed evidence would have affected the outcome of the trial, as this Court requires for evaluating the materiality of *Brady* evidence. *Kyles*, 514 U.S. at 434-35. Nor did the court consider whether there is "any reasonable likelihood" that Captain Stanley's false testimony would have affected the judgment of the jury, as this Court has instructed courts to do when evaluating the effect of false testimony. *See Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271). Instead, the court ignored this Court's well-established guidelines, denying Keith's claims because the evidence actually introduced at trial was sufficient to support conviction.[7]

Had the Ohio Court considered the suppressed evidence in light of the evidence as a whole, as this Court's precedent requires it to do, it would have

---

[7] The only discussion by the Ohio Court of Appeals of the suppressed evidence relating to "Amy Gimmets" is its reasoning that Keith's claim is barred by res judicata because it should have come out at trial or on direct appeal that no "Amy Gimmets" actually exists. But this reasoning turns a criminal prosecution on its head. Indeed, the court's reasoning is akin to holding that Keith's claims are barred because he found out too late in the game that testimony was false. No matter the circumstances, a capital murder conviction and sentence cannot stand when based on false testimony. The obligation to correct the record rests with the State, not Keith. *See Banks*, 540 U.S. at 675-76 ("When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight.").

concluded that the government's suppression of evidence undermined its confidence in the outcome of the trial. *See Kyles*, 514 U.S. at 435. The suppressed evidence bolsters the argument that Melton was the shooter, reinforcing evidence introduced at trial showing that: (1) the partial license plate numbers imprinted in a snow bank matched the license plate on Melton's car; (2) Melton owned and drove a light yellow Chevy Impala, which matched a witness's description of a "real light" colored car; (3) defense counsel had been contacted by one of Melton's relatives who stated that Melton was "in on the killings"; (4) Melton appeared at the crime scene knowing the type of bullets used in the shootings; (5) Melton, without being asked, created an alibi for himself by telling the police at the crime scene that his car—a car that matched the witness's description—was broken down that night; and (6) Chatman's daughter told police that she had been shot by "her daddy's friend Bruce"—Melton's brother is named Bruce and was also Chatman's friend.

It is reasonably likely that if the jurors had known also of Melton's multiple threats against Chatman and Melton's modus operandi of wearing a mask when committing a crime, coupled with the above evidence, they would not have discounted the totality of evidence pointing to Melton—and away from Keith. In short, had the Ohio Appellate Court asked the correct question, it would have concluded that the suppression of this evidence undermines confidence in the outcome of the trial.

Moreover, if the Ohio Court of Appeals had applied the correct analysis, it also would have

concluded that the suppression of this evidence combined with the false testimony of Captain Stanley seriously undermines confidence in the trial verdict. The suppressed evidence, had it been disclosed, would have flatly contradicted Captain Stanley's testimony that he first heard the name "Kevin" from the nurse attending to Warren. Or, in light of the impeachment value of the evidence, the prosecution might not have called Captain Stanley as a witness at all. In either case, the jury would have been left with only Warren's beleaguered witness identification of Keith, weakened by three key facts: (i) Warren initially told four different witnesses that he did not know who had shot him; (ii) the assailant was wearing a mask that covered much of his face; and (iii) it was the police that suggested the name "Kevin" to Warren. *See Keith*, 551 F.3d at 562 n.2 (Clay, J., dissenting).

The Ohio Court of Appeals' analysis thus illustrates how a sufficiency of the evidence standard will routinely fail to vindicate a defendant's due process rights under *Brady* where the excluded evidence undermines eyewitness testimony. First, as courts themselves have widely recognized, witness identification testimony is both powerful and inherently unreliable. *See, e.g., Towers v. Smith*, 395 F.3d 251, 260 (6th Cir. 2005) ("We have repeatedly expressed our 'grave reservations concerning the reliability of eyewitness testimony.'") (internal citation omitted); *see also* Brief of Memory Experts as Amici Curiae in Support of Petitioner. In light of the inherent concerns surrounding the use of eyewitness testimony, additional evidence bearing on its veracity is all the more important.

Critically, applying a sufficiency of the evidence standard will systematically fail to properly assess the effect of suppressed evidence bearing on the veracity of eyewitness identification testimony, and for a simple reason: a sufficiency analysis, like that conducted by the Ohio Court of Appeals here, does not ask the court to reevaluate the weight of the witness identification testimony in light of the suppressed evidence.

III. The Proper Application Of *Brady* Has Critical Implications For Exonerating The Wrongfully Accused

A. A Sufficiency of the Evidence Test Has Similarly Failed To Detect *Brady* Violations In Other Capital Cases Where Prisoners Were Later Exonerated

Courts that have applied a sufficiency analysis like that applied by the Ohio Court of Appeals have failed to properly detect *Brady* violations, as exonerations in these cases later vindicated the defendants' original claims.

For example, Calvin Washington was convicted of capital murder and sentenced to life in prison. *Washington v. State of Texas*, 822 S.W.2d 110 (Tex. Ct. App. 1991). He raised several *Brady* claims after his lawyer was allowed to inspect the prosecution's file on appeal. *Id.* at 121. The files contained an interview with a fellow inmate revealing that a state's witness had admitted that

Washington "wasn't the one," that a state investigator who had testified at Washington's trial was known to cut deals with inmates, and other impeachment and potentially exculpatory evidence. *Id.* They also contained the notes of a police investigator (who later also testified) containing exculpatory and impeachment leads, including a change of jail record benefiting a State's witness and testimony about the location of the victim's car. *Id.*

Nevertheless, the Texas court held that because the state's witnesses were cross-examined—despite the fact that defense counsel did not have key impeachment and exculpatory information—it did not "believe" "disclosure of further information of the nature described by Appellant would have created a reasonable doubt" and upheld the conviction. *Id.* at 122. The court failed to analyze whether the new evidence would have undermined confidence in the jury's verdict. Washington served another ten years before DNA testing exonerated him. *See* The Innocence Project - Profiles: Calvin Washington, http://www.innocenceproject.org/Content/283.php (last visited Apr. 2, 2010).

A similar misapplication of a sufficiency test to evidence never presented occurred in the case of Anthony Porter, who was convicted for a double homicide and sentenced to death. *People v. Porter*, 647 N.E.2d 972, 973–74 (Ill. 1995). Because of Porter's counsel's inadequate investigation, the jury never heard compelling testimony that another man, Alstory Simon, was guilty of the murders. One witness would have testified that the victims walked to the scene of the murders with Simon and that

Simon threatened the witness when she asked what had happened there. *Id.* Another witness would have testified that one of the victims had been selling drugs for Simon and that there was considerable animosity between Simon and that victim. *Id.* at 974.

In denying Porter's claim for ineffective assistance of counsel, the Illinois court held that the failure to present that testimony was not prejudicial because the evidence that was presented at trial "was considerable." *Id.* at 975.[8] Applying the same improper logic as the Ohio court in Keith's case, the Illinois court reasoned that the unpresented evidence "would simply echo" the alibi that the jury had heard in testimony that defense counsel did present and must have rejected. *Id.* Porter was exonerated several years later after: Simon confessed on videotape; a witness for the state recanted his testimony and stated that the police had pressured him to name Porter; and Simon's ex-wife's stated that that she had been present when Simon shot the victims and that Porter had nothing to do with the crime. *See* Northwestern Law Bluhm Legal Clinic, Center On Wrongful Convictions:

---

[8] The prejudice standard under *Strickland v. Washington*, 466 U.S. 668 (1984), is the same as the materiality standard under *Brady*. *See Strickland*, 466 U.S. at 694 ("[T]he appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

Anthony Porter, http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilPorterSummary.html (last visited Apr. 2, 2010).

In both cases, as in Keith's, a court improperly reasoned that because evidence presented to the jury was sufficient to support its verdict, testimony the jury never heard could not have affected the trial. This formulation strips the materiality analysis of meaning and resulted in courts upholding wrongful convictions.

B. The Proper Application Of *Brady* Is Critical To Securing New Trials For The Wrongfully Convicted

Brady has been essential in ensuring that prosecutors do not abuse their immense power to secure convictions and in overturning convictions of those who were wrongfully convicted because they were denied favorable evidence to support their defense. It has long been the case that "[t]he prosecutor has more power over life, liberty, and reputation than any other person in America." Robert H. Jackson, *The Federal Prosecutor, Address Before Second Annual Conference of U.S. Attorneys (Apr. 1, 1940)*, 31 J. Am. Inst. Crim. L. & Criminology 3 (1940). The men and women who are charged with this power exercise it under substantial pressure—from supervisors, the media, and voters—to win convictions. Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 Wis. L. Rev. 399, 405 (2006) (discussing societal and electoral pressures); Jeffrey

Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Calif. L. Rev. 1471, 1474 n.7 (1993) (discussing pressure from prosecutors' supervisors, as well as prosecutors' own determination to win); Paul R. Wallace, *Prosecuting in the Limelight*, 22 Del. Law. 20, 21 (2005) (discussing media pressures).

This pressure works on prosecutors in often subtle psychological ways, leading to the suppression of *Brady* evidence even by ethical prosecutors. Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 Ind. L. J. 481, 495 (2009) (identifying selective perception and cognitive dissonance as causes for suppression of evidence). In other cases, prosecutors react to these pressures by deliberately suppressing evidence in order to win a conviction. *E.g.*, *Pyle v. Kansas*, 317 U.S. 213, 215 (1942). [9]

Unfortunately, the system provides few tools to detect, correct, and prevent prosecutorial misconduct. *See* Joy, *supra* at 425–26 (noting the infrequency with which prosecutors face internal or external discipline for misconduct). This deficiency renders *Brady* all the more valuable: the courts assume a prominent role in deterring prosecutorial

---

[9] The costs of prosecutorial misconduct are not borne by the defendant alone. Misconduct deprives juries of the ability to determine the defendant's guilt or innocence without access to all of the facts that it needs to do so fairly. It results in verdicts not deserving of confidence, *see Bagley*, 473 U.S. at 682, damaging the legal system as a whole and the society that depends upon its integrity. The public also faces an immediate harm in the risk that, by putting an innocent person behind bars, the actual perpetrator escapes with impunity.

misconduct and remedying its effects. For that reason, courts must apply *Brady* with diligence and care. The Ohio Court of Appeals failed to take that obligation seriously, at great cost to both Keith and the integrity of the criminal justice system. If left undisturbed, its decision risks working a substantial injustice, not just for Keith, but also for other wrongfully convicted prisoners who may come before the Ohio courts in the future.

IV. This Court Should Grant Certiorari To Prevent Substantial Injustice.

As this Court has repeatedly noted, *Brady* violations are matters of Constitutional concern that implicate the right to a fair trial and the state's obligation to ensure that justice be done:

> The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment, imposes on States certain duties consistent with their sovereign obligation to ensure "that justice shall be done" in all criminal prosecutions. In *Brady v. Maryland*, we held that when a State suppresses evidence favorable to an accused that is material to guilt or to punishment, the State violates the defendant's right to due process, "irrespective of the good faith or bad faith of the prosecution."

Cone v. Bell, 129 S. Ct. 1769, 1772 (2009) (internal citations omitted). Proper analysis of *Brady* claims

and application of this Court's *Brady* jurisprudence are thus essential to prevent fundamental injustice: "The *Brady* rule is based on the requirement of due process. Its purpose is . . . to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675.

Cases such as Kevin Keith's, where "undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury," "involve a corruption of the truth-seeking function of the trial process" and are "fundamentally unfair." *Agurs*, 427 U.S. at 103-04. Such "'a deliberate deception of court and jury by the presentation of testimony known to be perjured' is inconsistent with 'the rudimentary demands of justice.'" *Bagley*, 473 U.S. at 680 n.8 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

As *Brady* itself makes clear, this Court's intervention in Keith's case is necessary to preserve confidence in the larger criminal justice system:

> The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. . . . A prosecution that withholds evidence on demand of an accused which, if made available, would

> tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . .

Brady, 373 U.S. at 87-88.

Kevin Keith's petition is not simply about a court's factual error. It is about a fundamental legal error in the Ohio Appellate Court's decision to apply a standard that this Court has expressly held, and indeed emphasized, should not be used to evaluate *Brady* claims. Members of this Court have indicated that in capital cases such as the instant one, even where the legal issues presented may not be novel, it is important for this Court to grant certiorari to ensure the correct application of the law. *See Kyles*, 514 U.S. at 455 (Stevens, J., concurring) ("Our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though our labors may not provide posterity with a newly minted rule of law."). Having failed to properly evaluate Keith's *Brady* claims, the Ohio courts have thereby failed to fulfill the purpose of *Brady*: to ensure that justice is done.

Accordingly, the Ohio Court of Appeals' decision, if left to stand, will result in real and substantial injustice. The suppressed evidence both implicates someone else in the murders and undermines the key testimony against Keith. A proper application of the standard governing *Brady*

claims would have shown that the suppressed evidence sheds serious doubt on whether the right man stands convicted of the crime and undermines any confidence in Keith's trial. Without the intervention of this Court, a man whom the state has deprived of a fair trial will be put to death by that same state. Having no reasonable certainty in the reliability of Keith's trial, this Court should grant certiorari to prevent this injustice before he receives the ultimate, irreversible punishment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

David Loftis
Nina Morrison
Counsel of Record
INNOCENCE PROJECT
100 5th Ave., 3rd Fl.
New York, NY 10011
(212) 364-5966
nmorrison@innocenceproject.org

Vernon Broderick
Adam B. Banks
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Daniel S. Medwed
Professor of Law
S.J. Quinney College of Law
University of Utah
332 S 1400 E Front
Salt Lake City, UT 84112
(801) 585-5228

Aaron Y. Huang
WEIL, GOTSHAL & MANGES LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
(650) 802-3000

Counsel for Amicus Curiae

Dated: April 5, 2010

APPENDIX

APPENDIX

The Innocence Network member organizations include the Alaska Innocence Project, Arizona Justice Project, Association in Defence of the Wrongly Convicted (Canada), California & Hawaii Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Cooley Innocence Project (Michigan), Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Georgia Innocence Project, Griffith University Innocence Project (Australia), Idaho Innocence Project (Idaho, Montana, Eastern Washington), Indiana University School of Law Wrongful Convictions Component, Innocence Network UK, The Innocence Project, Innocence Project at UVA School of Law, Innocence Project Arkansas, Innocence Project New Orleans (Louisiana and Mississippi), Innocence Project New Zealand, Innocence Project Northwest Clinic (Washington), Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Kentucky Innocence Project, Maryland Office of the Public Defender, Medill Innocence Project (all states), Michigan Innocence Clinic, Mid-Atlantic Innocence Project (Washington, D.C., Maryland, Virginia), Midwestern Innocence Project (Missouri, Kansas, Iowa), Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), North Carolina

Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender, State of Delaware, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post Conviction Project (New York), Palmetto Innocence Project, Pennsylvania Innocence Project, Rocky Mountain Innocence Project, Schuster Institute for Investigative Journalism at Brandeis University Justice Brandeis Innocence Project (Massachusetts), The Sellenger Centre (Australia), Texas Center for Actual Innocence, Texas Innocence Network, The Reinvestigation Project of the New York Office of the Appellate Defender, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), Wesleyan Innocence Project, and the Wisconsin Innocence Project.